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No. 83-1808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NINETY-TWO POINT SEVEN BROADCASTING, INC., *ET AL.*,
Petitioners,

v.

HANOVER RADIO, INC.,
Respondent.

BRIEF FOR RESPONDENT HANOVER RADIO, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. Whether the order of the Circuit Court of the City of Richmond, which directed specific performance of a contract contemplating joint presentation of a settlement agreement to the Federal Communications Commission for its approval, impinged upon the Commission's licensing authority or its powers under Section 311 of the Communications Act.

2. Whether a local court has jurisdiction to enforce a contract, whose interpretation and enforcement the Commission itself regards as a matter of local law, where petitioners' breach of their contractual obligation to present the settlement agreement to the Commission deprived the agency of any opportunity to consider it.

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v.

HANOVER RADIO, INC.,
Respondent.

BRIEF FOR RESPONDENT HANOVER RADIO, INC. IN OPPOSITION

STATUTES AND REGULATIONS

Petitioner has furnished the Court with obsolete versions of 47 U.S.C. Section 311 and 47 C.F.R. Section 73.3525. The current language of the statute and its implementing regulation, effective since September 13, 1982, and April 7, 1983, respectively, is contained in App. A, *infra.*

STATEMENT OF THE CASE*

The Settlement Agreement and Its Submission to the Commission

The settlement contract between Ninety-Two Point Seven Broadcasting, Inc. ("92.7") and Hanover Radio, Inc. ("Hanover"),[1] in addition to the provisions cited by 92.7, stated that the parties agreed to use their best efforts to achieve Federal Communications Commission ("Commission" or "FCC") approval.[2] In pursuance of this obligation, 92.7 submitted voluminous materials to the Administrative Law Judge Joseph Chachkin in support of its proposed reimbursement.[3] On March 10, 1984, the Commission's Broadcast Bureau filed comments with the Presiding Judge supporting approval of the Hanover-92.7 contract. The Broadcast Bureau also recommended grant of Hanover's application, indicating that Hanover was qualified to be a Commission licensee.

Administrative Law Judge Joseph Chachkin's April 1982 Ruling

Subsequent to the Bureau's filing and further supplementation by 92.7 regarding its expenses, the matter was ripe for decision by the Presiding Judge. However, 92.7's announcement that it was repudiating the agreement intervened. This breach of contract was the basis of Hano-

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*Respondent has the following corporate affiliates: WCVL, Inc., Honeyradio, Inc., Old Dominion Broadcasting Co., Inc., Sinclair TeleCable, Inc., and West Yellowstone Cablevision, Inc.

[1]A copy is attached as App. B, *infra*.

[2]App B at 10a-11a.

[3]Prior to September 1982, Section 311 of the Communications Act required the Commission to limit this reimbursement to actual out-of-pocket expenses. See Pet. at App. F.

ver's suit for specific performance in the Circuit Court of Richmond and is the subject matter of this appeal.

In granting 92.7's motion to withdraw from the settlement, Judge Chachkin expressly held that the binding effect on 92.7 of the settlement contract was "something between the parties to settle privately."[4] "In light of the fact that there [was] a proceeding pending in the state court,"[5] the judge held that Hanover's only remedy was to "go ahead and enforce the contract" in that forum.[6] In permitting 92.7 to resume prosecution of its application, Judge Chachkin explained: ". . . I'm not in any way reflecting on what action you may have in the state courts . . ."[7] He added: "And if something develops in the state court, then we'll just have to wait and see what happens."[8]

The Review Board's
September 17, 1982, Decision

In contravention of Rule 21.1k(ii), petitioners omit mention of the 1982 *Memorandum Opinion And Order* of the Commission's Review Board. That order imposed a stay on the administrative proceeding pending the outcome of the Virginia litigation.[9] The Board held in Hanover's favor on an interlocutory appeal from Judge

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[4]Portions of the transcript containing Judge Chachkin's comments relied upon here are attached as App. C, *infra*. See 12a.

[5]Hanover had informed the ALJ that it had filed suit in Richmond to enforce the settlement contract.

[6]App. C at 13a.

[7]App. C at 14a.

[8]App. C at 15a.

[9]*Hanover Radio, Inc.*, 91 FCC 2d 849, 52 RR 2d 403 (Rev. Bd. 1982), attached as App. D, *infra*.

Chachkin's refusal to stay the hearing in light of the Circuit Court's August 17, 1982, decision.[10]

The Judge had reasoned that the Commission hearing should go forward until the Circuit Court's order became final. The Board disagreed. It observed that "the Commission has previously indicated its view that it will defer to state contract law even where the effect of the *lex loci* is to preclude the prosecution of a competing broadcast application by a local entity."[11] Noting that further Commission proceedings could be "mooted by collateral judicial interdiction," the Board concluded:

> "If 92.7 is enjoined by state law to specifically perform its settlement contract, we expect that the applicant will abide by that law."[12]

Hanover's Motion to Dismiss Appeal Improvidently Granted

Petitioners compound their omission of the vital 1982 Review Board decision by asserting that Hanover's successful motion to dismiss 92.7's state court appeal was based on a letter from the FCC's General Counsel. (Pet. at 8.) This is inaccurate. The General Counsel's letter was not released until November 10, 1983, while Hanover's motion was filed on October 17, 1983.[13] Instead, respondent's motion relied upon the Review Board's 1982 decision discussed above. 92.7 had also omitted mention of the Review

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[10]The Review Board is an appellate body delegated authority to review decisions of Administrative Law Judges in hearing cases. See §§0.361, 0.365(b), and 1.301(c)(6) of the FCC's rules, 47 CFR §§0.361, 0.365(b) and 1.301(c)(6). See App. E.

[11]App. D at 19a-20a. Citation omitted.

[12]App. D at 19a, 21a.

[13]The motion is attached as App. F, *infra*.

Board's decision in the petition for appeal it filed with the Virginia Supreme Court. Hanover did not file a responsive pleading but rather unsuccesfully moved to dismiss on procedural grounds. When the Virginia Supreme Court granted 92.7's appeal and agreed to consider the case, Hanover moved to dismiss. The basis for the motion was Hanover's belief that the State Supreme Court was unaware of the Commission's support of Hanover's position, as expressed in the Review Board's decision.

The General Counsel's Letter and The Commission's Order Affirming It

While petitioners advert to the Commission's General Counsel's November 1983 letter, they do not append a copy of this important document. Nor do petitioners report that the position taken in the letter was formally adopted by the Commission itself on February 10, 1984,[14] in response to an appeal by 92.7. In those actions, the Commission "concur[red] with [Hanover's] position" that the state courts had the "authority" to interpret the Hanover-92.7 settlement contract and "to fashion an appropriate remedy, including ordering specific performance."[15] The agency held that "[i]n directing 92.7 to seek our approval, the court would not be usurping our authority to determine whether approval of that settlement agreement is in the public interest," nor would it be infringing upon the FCC's licensing authority.[16] As the Commission stated:

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[14] *Ninety-Two Point Seven Broadcasting, Inc.*, 55 RR 2d 607 (Comm. 1984). Copies of the General Counsel's letter and the Commission's *Memorandum Opinion And Order* are attached as App. G.

[15] App. G at 46a-47a.

[16] App. G at 47a.

"While Section 311(c) of the Act, 47 U.S.C. 311(c), requires that the contract not be effectuated until the applicants have received Commission approval, the Act does not preclude applicants from entering into valid contracts that are subject to our approval. The enforcement of such contracts at any point after they become legally binding under state law does not impede our ability to reach a public interest determination vis-a-vis the settlement agreement. Even though the court could require the litigants to submit the agreement to the Commission, the court cannot require our approval of the agreement. Further, pursuant to Section 309(a) of the Communications Act, 47 U.S.C. §309(a), the Commission must also determine whether a grant of the remaining application is in the public interest."[17] [18]

REASONS FOR DENYING THE WRIT

A. The State Court's Injunction Does Not Impinge Upon the FCC's Licensing Authority

Petitioners assert that the Virginia courts have trampled upon the FCC's "authority to regulate communications" (Pet. at 11), citing *Radio Station WOW, Inc. v. Johnson*[19] and state supreme court decisions interpreting *WOW*. The

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[17] App. G at 42a.

[18] Subsequent to the filing of 92.7's petition for certiorari, the Review Board issued another *Memorandum Opinion And Order* (FCC 84R-31, May 7, 1984, attached as App. H, *infra*.) The Board stayed the Commission proceeding once again in light of the Virginia Supreme Court's stay of March 22, 1984. However, the Board reiterated that both it and the Commission "have firmly ruled that the status and disposition of the contract matter is for *jus privatum* determination." App. H at 52a.

[19] 326 U.S. 120 (1944).

test stated in *WOW*, however, was not whether state court action interferes with the Commission's power "to regulate communications." (Pet. at 11.) Rather, the *WOW* Court focused exclusively on whether a restriction "upon the *licensing system* which Congress established" resulted from an order to a party to seek retransfer of a license from the agency.[20]

In the case at bar, the Circuit Court emphasized that it was "undertaking to rule [only] upon those things which are within its jurisdiction, that is, the contract between the parties."[21] In response to a request for clarification by 92.7, the Court agreed that, should the Commission reject the joint request for approval of settlement contract in spite of petitioners' good faith efforts to secure approval, 92.7 could resume prosecution of its application.[22] Counsel for petitioners subsequently characterized the Circuit Court's letter as "expressly recognizing the FCC's right to reject the agreement."[23]

Similarly, the Commission recognized its right to reject the agreement. The agency also was aware of its *independent* right, even if the settlement agreement were acceptable under Section 311, to refuse to license Hanover, thereby throwing open the FM channel to new applicants. See App. G at 42a. Based on this understanding, the Commission found that the Circuit Court's

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[20]326 U.S. at 131. Emphasis added. See also *Themy v. Seagull Enterprises, Inc.*, 595 P.2d 526, 532 (S. Ct. Utah 1979) (upholding state court decision where defendant not required to seek transfer of license into plaintiff's name).

[21]See letter of September 30, 1982, from the Court to counsel for petitioners, attached as App. I, *infra*.

[22]*Id.*

[23]See October 28, 1982, letter from 92.7's counsel to Judge Chachkin appended as App. J, *infra*.

> "demarcation of respective roles of the Virginia courts and this Commission in a situation involving both the validity of a private contract under state law and the Commission's licensing responsibility reflects a proper accommodation between state and federal authority and is consistent with the Supreme Court's decision in *Radio Station WOW v. Johnson* . . . ."[24]

This holding is entitled to great deference by this Court. *Udall v. Tallman,* 380 U.S. 1 (1965). See also *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969) (citing ". . . venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . "); *Zenith Radio Corp. v. U.S.,* 437 U.S. 443, 450 (1978).[25]

The Commission's position here must be contrasted with the position it took in *WOW.* As in *WOW,* the agency's position should control, absent indications that it has committed serious error. In *WOW,* the agency opined that the state court's injunction could not be reconciled with the FCC's licensing jurisdiction. In the instant case, *five different branches* of the Commission have agreed that the state court's injunction is not only consistent with Commission authority, but complementary thereof. Such an emphatic holding by an administrative agency with decades of experience in regulating settlement agreements should be respected.

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[24]App. G at 42a.

[25]See also *New York State Dept. of Soc. Serv. v. Dublino,* 413 U.S. 405, 421 (1973), wherein federal preemption was rejected in view of the affected agency's firm position that the state action at issue was permissible.

WOW is also distinguishable because the mandatory injunction in that case ordered defendant to seek a retransfer of license, *i.e.*, a Commission action *reversing* the action previously taken by the agency. In the instant case, on the other hand, the Commission is not to be asked to undo prior action. Specific performance here is not intended to "invalidate or overturn a Commission rule or order."[26] Instead, it is intended to provide the agency with an opportunity for the first time to make a determination on whether the settlement agreement is in the public interest. Such a purpose, far from infringing upon the Commission's regulatory powers, facilitates their exercise.

B. Denial of Specific Performance Would Unfairly Nullify The Hanover-92.7 Agreement Leaving Hanover Remediless

The contract at issue here is not a sales contract, but a routine agreement between litigating parties to present a settlement agreement to the Commission for its approval.[27] Denial of specific performance to Hanover would gut this contract by nullifying its core provision — the agreement to present it to the FCC.[28] In general, acceptance of 92.7's arguments would preclude a remedy for *any* litigant before the Commission who has contracted to seek Commission

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[26]App. G at 46a, n.1.

[27]Petitioners paradoxically emphasize this distinction where it suits their purposes (at 17-18), but ignore it where the point does not aid their argument.

[28]The injustice of this result is evident from its "Catch-22" effect — under 92.7's scenario, the Commission would be referring Hanover to the state courts for relief, while the state courts would be required to defer to the Commission. As the FCC's General Counsel noted, "Indeed, if 92.7 is to be bound by its settlement agreement contract, your only avenue for seeking enforcement was to request such specific performance in the court." App. J at 47a.

approval to terminate the litigation prior to grant of that approval. This makes no sense from a contractual perspective, and as argued below, it is not what Section 311 of the Communications Act intends.

C. Section 311 Does Not Oust State Courts of Jurisdiction to Enforce Private Contracts to Submit Settlement Agreements to the Commission

Petitioners alternatively urge that Section 311 and the FCC's regulations thereunder barred the state court injunction at issue. To 92.7, that statute's plain meaning is that FCC approval was a "condition precedent" to enforcement of the Hanover-92.7 contract. (Pet. at 23-24.)

Petitioners are wrong on several counts. First, 92.7 misconstrues the contractual provisions enforced by the Circuit Court order. These provisions do not "effectuate an agreement whereby one or more of such applicants withdraws his . . . application . . ."[29] The contract recognizes that the dismissal of 92.7's application can happen only upon FCC approval. The specific performance order implements only the contractual provisions that obligated petitioners to join in submitting the agreement for FCC approval, and concomitantly, doing nothing to undermine such approval.[30]

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[29]Section 311(c)(1).

[30]Therefore, the Circuit Court's order in no way "validate[s] a proposed settlement agreement prior to a condition precedent . . ." (Pet. at 22). The order only restores the *status quo* prior to breach by insuring that the agreement will be filed with the Commission. The agency may then exercise its authority under Section 311, either to approve or disapprove the dismissal agreement.

Not only does 92.7 misinterpret the settlement contract, but petitioners distort the meaning of Section 311. Congress most definitely did not intend "that the FCC gain complete control of these agreements."[31] On the contrary, Section 311, particularly as amended in 1982, encourages settlement in FCC proceedings by narrowly limiting the Commission's purview over such agreements. The legislative history of Section 311 supports this position.

Prior to the 1960 enactment of Section 311, the FCC reviewed settlement agreements under its general mandate to insure that licensee conduct is in the "public interest." *NBC, Inc.*, 25 RR 67, 70-72 (Comm. 1963). While there may be an inherent detriment to the public interest from settlements as a result of the elimination of a choice of applicants, the FCC has always recognized that

> "that detriment is more than offset by the consideration that the withdrawal permits one of several qualified applicants to bring a needed service to the public without the lengthy delay involved in the multi-party comparative hearing . . ." *NBC, supra,* at 73.

In 1960, Congress amended the Communications Act to deal with one specific problem related to FCC settlement agreements – "nuisance" applications filed in bad faith for the purpose of exacting excessive "pay-offs." *NBC, supra;* H.R. Rep. No. 1800, 86th Cong., 2d Sess., June 13, 1960, reprinted in 1960 *U.S. Code Cong. and Admin. News,* p. 3516. Because the record indicated that such abuses were widespread, Congress passed Section 311,

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[31] Pet. at 23.

prohibiting reimbursement in excess of an applicant's "legitimate and prudent" expenses.[32]

Even as originally enacted, Section 311 did not embody an intention to give the FCC plenary authority over settlement agreements. The authors of the legislation did not intend to oust state courts of their traditional authority to enforce contracts. Rather, as the Conference and House Reports in 1960 make clear, Congress targeted only those settlement contracts involving excessive reimbursement for federal regulation. *Bona fide* settlements by good faith applicants continued to be encouraged, and therefore outside the scope of Commission regulation.[33]

In 1982, Congress amended Section 311.[34] The amendment "intentionally relaxed the Communications Act so as to remove all unnecessary impediments to settlement and dismissal agreements." *Dayton Telecasting, Inc.*, 54 RR 2d 1403, 1404 (Rev. Bd. 1983).[35] Subsequently, the Commission revised Section 73.3525 of its rules to reflect the Congressional directive. *Settlement Agreements in Broadcast Proceedings*, 53 RR 2d 823 (Comm. 1983).[36]

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[32]The FCC adopted §1.525 (now §73.3525) to implement Section 311's specific purpose. Until revised in April 1983, the rule required extensive documentation of an applicant's expenses.

[33]See, *e.g.*, 1960 *U.S. Code Cong. and Admin. News*, at 3523-24; H.R. Rep. No. 1258, 86th Cong., 2d Sess. at 39; H.R. Rep. No. 2711, 85th Cong., 2d Sess. at 19 (1960); Testimony of FCC Chairman Frederic Ford, Hearings Before the House Committee on Interstate and Foreign Commerce, April 12, 1960, p. 33.

[34]P.L. 97-259, 96 Stat.1087, 1095, September 13, 1982.

[35]See also H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess., August 19, 1982, reprinted in 1982 *U.S. Code Cong. and Admin. News*, at 2237, 2293-94.

[36]Respondent notes that the language in §73.3525 quoted and relied upon by petitioners at pages 23-24 of the petition was deleted in 1983.

In the wake of these revisions in the governing statute and the rule, the FCC's authority over settlement agreements is anything but "complete." (Pet. at 23.) Its authority is limited to a determination that the agreement meets a broad "public interest" standard and that "no party to the agreement filed its application for the purpose of reaching or carrying out such agreement."[37] In practice, these requirements are met simply by filing a conclusory affidavit, citing the termination of burdensome litigation and asserting the *bona fides* of the dismissing party's application.[38]

In sum, neither the language nor the legislative history of Section 311 dictates federal preemption of local courts' jurisdiction over settlement contracts. Such contracts "are by nature private contractual arrangements."[39] Accordingly, the Commission has properly interpeted the statute to allow deference to the *"lex loci"* as a matter of comity where state court action does not conflict with the statute's intent. *Hanover Radio, Inc., supra,* App. D at 20a, citing *Raul Santiago Roman,* 4 RR 2d 175, *recon. denied,* 38 FCC 619, 4 RR 2d 777 (Rev. Bd. 1965).

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[37]Section 311(c)(3).

[38]See, *e.g., Cedar Creek Radio Co.,* 53 RR 2d 745 (Rev. Bd. 1983).

[39]*Anax Broadcasting, Inc.,* 88 FCC 2d 607, 611, 50 RR 2d 798, 801 (Comm. 1981.)

CONCLUSION

Petitioners seek to portray this case as a significant collision of federal and state authority. It is not. It is merely a "garden-variety" breach of contract lawsuit. Denial of certiorari will reinstate a state court order performing the traditional function of restoring the contractual *status quo*. Denial will thus leave petitioners precisely in the position they occupied prior to their breach of contract. There is nothing illegal or unjust about such a resolution to this already over-litigated matter. The only "miscarriage of justice" here would result from a holding that 92.7 was immune from specific performance solely because breach of contract occurred before FCC approval. The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

§ 311. Requirements as to certain applications in the broadcasting service – Notices of filing and hearing; form and contents

(a) When there is filed with the Commission any application to which section 309(b) (1) of this title applies, for an instrument of authorization for a station in the broadcasting service, the applicant –

(1) shall give notice of such filing in the principal area which is served or is to be served by the station; and

(2) if the application is formally designated for hearing in accordance with section 309 of this title, shall give notice of such hearing in such area at least ten days before commencement of such hearing.

The Commission shall by rule prescribe the form and content of the notices to be given in compliance with this subsection, and the manner and frequency with which such notices shall be given.

Place of hearing

(b) Hearings referred to in subsection (a) of this section may be held at such places as the Commission shall determine to be appropriate, and in making such determination in any case the Commission shall consider whether the public interest, convenience, or necessity will be served by conducting the hearing at a place in, or in the vicinity of, the principal area to be served by the station involved.

Agreement between two or more applicants; approval of Commission; pendency of application

(c) (1) If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form, and manner as the Commission shall by rule require.

(3) The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

(4) For the purposes of this subsection an application shall be deemed to be "pending" before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court.

(d) License for operation of station; agreement to withdraw application; approval of Commission

If there are pending before the Commission an application for the renewal of a license granted for the operation of a broadcasting station and one or more applications for

a construction permit relating to such station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications in exchange for the payment of money, or the transfer of assets or any other thing of value by the remaining applicant or applicants.

(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form, and manner as the Commission shall require.

(3) The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

(4) For purposes of this subsection, an application shall be deemed to be pending before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court.

§ 73.3525 Agreements for removing application conflicts. — (a) Whenever applicants for a construction permit for a broadcast station enter into an agreement to procure the removal of a conflict between applications pending before the FCC by withdrawal or amendment of an application or by its dismissal pursuant to § 73.3568, all parties thereto shall, within 5 days after entering into the agreement, file with the FCC a joint request for approval of

such agreement. The joint request shall be accompanied by a copy of the agreement and an affidavit of each party to the agreement setting forth:

(1) the reasons why it is considered that such agreement is in the public interest; and

(2) A statement that its application was not filed for the purpose of reaching or carrying out such agreement.

(b) Whenever two or more conflicting applications for construction permits for broadcast stations pending before the FCC involve a determination of fair, efficient and equitable distribution of service pursuant to Section 307(b) of the Communications Act, and an agreement is made to procure the withdrawal (by amendment to specify a different community or by dismissal pursuant to § 73.3568) of the only application or applications seeking the same facilities for one of the communities involved, all parties thereto shall file the joint request and affidavits specified in paragraph (a) of this section.

(1) If upon examination of the proposed agreement the FCC finds that withdrawal of one of the applications would unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several states and communities, then the FCC shall order that further opportunity be afforded for other persons to apply for the facilities specified in the application or applications to be withdrawn before acting upon the pending request for approval of the agreement.

(2) Upon release of such order, any party proposing to withdraw its application shall cause to be published a notice of such proposed withdrawal at least twice a week for 2 consecutive weeks within the 3-week period immediately following release of the FCC's order, in a daily

newspaper for general circulation published in the community in which it was proposed to locate the station. However, if there is no such daily newspaper published in the community, the notice shall be published as follows:

(i) If one or more weekly newspapers of general circulation are published in the community in which the station was proposed to be located, notice shall be published in such a weekly newspaper once a week for 3 consecutive weeks within the 4-week period immediately following the release of the FCC's order.

(ii) If no weekly newspaper of general circulation is published in the community in which the station was proposed to be located, notice shall be published at least twice a week for 2 consecutive weeks within the 3-week period immediately following the release of the FCC's order in the daily newspaper having the greatest general circulation in the community in which the station was proposed to be located.

(3) The notice shall state the name of the applicant; the location, frequency and power of the facilities proposed in the application; the location of the station or stations proposed in the applications with which it is in conflict; the fact that the applicant proposes to withdraw the application; and the date upon which the last day of publication shall take place.

(4) Such notice shall additionally include a statement that new applications for a broadcast station on the same frequency, in the same community, with substantially the same engineering characteristics and proposing to serve substantially the same service area as the application sought to be withdrawn, timely filed pursuant to the FCC's rules, or filed, in any event, within 30 days from the last date of publication of the notice (notwithstanding any

provisions normally requiring earlier filing of a competing application), will be entitled to comparative consideration with other pending mutually exclusive affidavits.

(5) Within 7 days of the last day of publication of the notice, the applicant proposing to withdraw shall file a statement in triplicate with the FCC giving the dates on which the notice was published, the text of the notice and the name and location of the newspaper in which the notice was published.

(6) Where the FCC orders that further opportunity be afforded for other persons to apply for the facilities sought to be withdrawn, no application of any party to the agreement will be acted upon by the FCC less than 30 days from the last day of publicaton of the notice specified in (2) of this paragraph. Any applications for a broadcast station on the same frequency in the same community, with substantially the same engineering characteristics and proposing to serve substantially the same service area as the application sought to be withdrawn, filed within the 30-day period following the last date of publication of the notice (notwithstanding any provisions normally requiring earlier filing of a competing application), or otherwise timely filed, will be entitled to comparative consideration with other pending mutually exclusive applications. If the application of any party to which the new application may be in conflict has been designated for hearing, any such new application will be entitled to consolidation in the proceeding.

(c) Except where a joint request is filed pursuant to paragraph (a) of this section, any applicant filing an amendment pursuant to § 73.3522(a) or a request for dismissal pursuant to § 73.3568(a) which would remove a conflict with another pending application; or a petition for

leave to amend pursuant to 73.3522(b) or (c) which would permit a grant of the amended application or an application previously in conflict with the amended application; or a request for dismissal pursuant to § 73.3568(c), shall file with it an affidavit as to whether or not consideration (including an agreement for merger of interests) has been promised to or received by such applicant, directly or indirectly, in connection with the amendment, petition or request.

(d) Upon the filing of a petition for leave to amend or to dismiss an application for broadcast facilities which has been designated for hearing or upon the dismissal of such application on the FCC's own motion pursuant to § 73.3568(b), each applicant or party remaining in hearing, as to whom a conflict would be removed by the amendment or dismissal shall submit for inclusion in the record of that proceeding an affidavit stating whether or not he has directly or indirectly paid or promised consideration (including an agreement for merger of interests) in connection with the removal of such conflict.

(e) Where an affidavit filed pursuant to paragraph (d) of this section states that consideration has been paid or promised, the affidavit shall set forth in full all relevant facts, including, but not limited to, the material listed in paragraph (a) of this section for inclusion in affidavits.

(f) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(g) Requests and affidavits which relate to an application which has not been designated for hearing shall bear the file number of such application. If the affiant is also

an applicant, the affidavit shall also bear the file number of affiant's pending application(s). Requests and affidavits which relate to an application which is designated for hearing shall bear the file number of that application and the hearing docket number and will be acted on by the presiding officer.

(h) For the purposes of this section an application shall be deemed to be "pending" before the FCC and a party shall be considered to have the status of an "applicant" from the time an application is filed with the FCC until an order of the FCC granting or denying it is no longer subject to reconsideration by the FCC or to review by any court.

APPENDIX B

AGREEMENT

This Agreement is made and entered into by Hanover Radio, Inc. ("Hanover") and Ninety-Two Point Seven Broadcasting, Inc. ("92.7"):

WHEREAS, Hanover has filed an application for authority to construct a new FM station on FM Channel 224 at Mechanicsville, Virginia (File No. BPH-780831AQ); and

WHEREAS, 92.7 has also filed an application for authority to construct a new FM station on Channel 224 at Mechanicsville, Virginia (BPH-780831AR); and

WHEREAS, each of the applications is mutually exclusive with the other; and

WHEREAS, the parties desire to resolve the conflict between their mutually-exclusive applications, in the interest of expediting the inauguration of FM service to Mechanicsville; and

WHEREAS, 92.7 is willing to dismiss its application on the terms hereinafter set forth due to the magnitude of expense heretofor incurred in prosecuting its application and required to further prosecute that application.

NOW, THEREFORE, in consideration of the premises and mutual agreements, representations, terms and conditions set forth, the parties agree as follows:

1. Within five (5) days after the execution of this Agreement, the parties will, in accordance with Section 73.3525 of the Rules of the Federal Communications Commission ("Commission"), file a Joint Request for the Commission's approval of this Agreement and request dismissal of the 92.7 application and grant of Hanover's application.

2. As consideration to 92.7 for the dismissal of its application, Hanover hereby agrees, subject to the approval of the Commission, to reimburse 92.7 for its reasonable and prudent expenses attributable to 92.7's efforts to prepare, file and prosecute its application in an amount not to exceed $73,000 or an amount which the Commission shall deem acceptable, whichever is lower. This amount shall be payable as follows: one-half of the amount shall be paid within thirty ("30") days of the date the Commission's action approving this Agreement becomes a "Final Order." (As used herein, "Final Order" means action taken by the Commission or its delegatee which is not subject to further Commission or judicial review or reconsideration.) The balance of the amount payable to 92.7 shall be paid within one-hundred and twenty ("120") days of the date of the Final Order. Payment shall be made by check payable to the order of 92.7 and delivered to Gene Bechtel, Esq., Suite 402, 1000 Potomac Street, N.W., Washington, D.C. 20007.

3. Hanover and 92.7 further agree that the parties shall execute for filing all affidavits and furnish all documents and information necessary to support the Joint Request for Approval of Agreement, referred to in ¶ 1, above. 92.7 recognizes that it must substantiate its legitimate and prudent expenses and establish to the Commission's satisfaction its qualifications to receive reimbursement.

4. Should the Commission refuse to approve this Agreement, the parties hereby agree that they will immediately make good faith efforts to resolve each Commission objection in order to obtain Commission approval.

5. This Agreement constitutes the entire understanding among the parties, and no other action or forebearance is contemplated or relied upon by them.

6. This Agreement may be signed in counterparts, each of which shall be deemed a duplicate original. The effective date shall be the date of the last signature stated below.

HANOVER RADIO, INC.

By: /s/
John Sinclair
President

Date: 2/2/82

NINETY-TWO POINT SEVEN BROADCASTING, INC.

By: /s/
Marilyn Edwards
President

Date: 1/29/82

APPENDIX C

request should be denied, that the Presiding Judge should continue ahead to process the joint request for approval.

JUDGE CHACHKIN: On what basis? If the parties – if one of the party's wants to withdraw?

MR. WEISS: Your Honor –

JUDGE CHACHKIN: How could I require the parties to go through with the settlement?

MR. WEISS: It is our position, first of all, that the parties had a contract that the action –

JUDGE CHACHKIN: Well isn't that something between the parties to settle privately?

MR. WEISS: Well, Your Honor –

JUDGE CHACHKIN: The question in –

MR. WEISS: – on that point I think I should make a report. Yesterday, Hanover filed suit in Richmond Circuit Court alleging a breach of contract, asking for a temporary restraining order. The restraining order was denied on the grounds that there is no irreparable injury. However, the Court indicated that it was very interested in expediting this situation, and there is a trial, a jury trial set for May 21 in Richmond on – I'm informed by counsel it will be a one day trial; there will be a ruling that day on the specific performance.

And Hanover intends to ask for an injunction restraining 92.7 from taking any further action in violation

* * * *

necessary documents, will make an attempt to obtain your approval.

Under those circumstances, your approval is a condition subsequent, a contingency that the contract – the contractual obligation remains in force.

JUDGE CHACHKIN: Well –

MR. WEISS: It is our position that under those circumstances, what has happened here is a very clear breach of contract, and we are heading ahead – I understand the need for expedition, and as a result, we are heading ahead just as fast as possible to get a state court ruling on it.

JUDGE CHACHKIN: Well I don't intend to – well, anyone else have any comments? The Bureau have any comments on what position with respect to this matter, whether I'm – in light of the fact that there is a proceeding pending in the state court, that therefore, I should not let you go ahead and enforce the contract or make any other action?

Mr. Silva –

MR. WEISS: Your Honor, excuse me.

JUDGE CHACHKIN: Oh, you have something further?

MR. WEISS: Could I go on?

I do have something further.

JUDGE CHACHKIN: All right. I'm sorry.

MR. WEISS: Let me state – well, I will state

approve it.

JUDGE CHACHKIN: Well it seems to me if I have pending before me this joint – this request for dismissal, I don't see any basis that I can deny it.

MR. WEISS: Your Honor –

JUDGE CHACHKIN: – that I can deny this motion to withdraw settlement proposal. Do you have any case precedent which – and I'm not in any way reflecting on what action you may have in the state courts, but what basis do I have to deny this motion to withdraw settlement proposal, particularly where there are misrepresentation issues pending and the party has determined that they want to litigate the issues?

MR. WEISS: Your Honor, it seems to me you at least have a right to insist that you know who the party is. I mean we – we've got an indication –

JUDGE CHACHKIN: I don't have a transcript of the state court proceeding. I don't know what context –

MR. WEISS: Your Honor, I don't have anything that I could, along those lines. I mean I –

JUDGE CHACHKIN: Well, I mean I don't know what the argument made – maybe the argument was made and I wasn't there. That – although Marilyn Edwards may be the authorized representative, perhaps the articles of incorporation in the by laws require the action by the board of

* * * *

depositions. This is only April. Beginning of April. Don't you have sufficient time for conducting depositions, Mr. Weiss?

MR. WEISS: Your Honor, certainly there's sufficient time if I proceed ahead immediately, but – well –

JUDGE CHACHKIN: That's your choice, whether you proceed ahead or not, or rely on what's going to happen in state court. But as far as I'm concerned, I see no basis for putting off the hearing any further than early June.

It seems to me a decision in this case is long overdue, and it's time to move ahead. And if something develops in the state court, then we'll just have to wait and see what happens.

And I'm not going to wait for the – to see what happens in state court before I schedule a hearing date.

MR. ROBINSON: Your Honor, to help you with the scheduling, we request that we have until next Wednesday or the 14th to file our petition to enlarge.

JUDGE CHACHKIN: Well it's not a question of your requesting an opportunity to me, because first, you're going to have to demonstrate that good cause is shown for not filing up until now, notwithstanding there's been change of counsel. So it's not a question anymore of me giving you additional time. You'll have to demonstrate that there's

* * * *

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 82R-55

In re Applications of	)	
	)	
HANOVER RADIO, INC.	)	
Mechanicsville, Virginia	)	BC DOCKET No. 80-664
	)	File No. BPH-780831AQ
	)	
NINETY-TWO POINT SEVEN BROADCASTING, INC.	)	BC DOCKET No. 80-665
Mechanicsville, Virginia	)	File No. BPH-780831AR
	)	
For Construction Permit	)	
For a New FM Station	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1982; Released: September 17, 1982

BY THE REVIEW BOARD:

1. The Review Board has before it a petition for extraordinary relief filed August 31, 1982 by Hanover Radio, Inc. (Hanover) seeking reversal of the ruling of ALJ Joseph Chachkin refusing to suspend procedural dates in the above-captioned proceeding. Also before the Board are: (i) an opposition by Ninety-Two Point Seven Broadcasting, Inc. (92.7) filed on September 3, 1982; (ii) comments filed by the Broadcast Bureau September 3,

1982; and (iii) supplement filed by Hanover on September 8, 1982. For the reasons set forth below, we will grant Hanover's petition.

2. Before discussing the substantive merits of the dispute, we must first address the procedural aspects of Hanover's petition. 92.7 notes in its opposition that Section 1.301(b) of the Commission's rules (47 CFR § 1.301(b)) permits appeals of ALJ interlocutory rulings only upon leave of the ALJ. And, 92.7 is also correct when it contends that such interlocutory rulings are final under the rule unless there has been egregious error or manifest abuse of discretion and the appealing party has met the burden of establishing that such has occurred. *Communications Satellite Corp.*, 32 FCC 2d 593 (1971). As discussed more fully herein below, however, we depart from 92.7 and find that Hanover has met its burden.

3. By way of context, Hanover's appeal in this comparative contest for a new FM station in Mechanicsville, Virginia follows 92.7's withdrawal from a settlement agreement pursued under the umbrella of Section 311 of the Communications Act of 1934, as amended (47 U.S.C. § 311). Although a settlement agreement between the competing parties was submitted on February 4, 1982, 92.7 on March 31, 1982, sought to withdraw from the agreement. On April 7, 1982, the ALJ permitted 92.7 to withdraw and scheduled a hearing on the outstanding issues against Hanover. Hearing was completed in June 1982, and the filing of proposed findings was scheduled for September 3, 1982. On August 17, 1982, pursuant to an action brought by Hanover, the Circuit Court of the City of Richmond ruled that Hanover was entitled to specific performance of the agreement and directed counsel to submit a draft order to that effect. Hanover, on August 20, 1982, sought a continuance of procedural dates in light of the

court's ruling and on August 27, 1982, the ALJ denied the request except that he granted a two-week extension of time to file findings.

4. Hanover thus seeks from us a vacation of the ALJ's refusal to stay the procedural dates for the submission of proposed findings, the operative effect of such reversal being the imposition of the stay refused below. In order to adduce whether Hanover has met its burden for accepting its appeal by showing egregious error or manifest abuse of discretion, *Communications Satellite Corp., supra,* we believe it appropriate to analyze the ALJ's action under the legal criteria commonly used to resolve stay requests. In such instances, the courts look to several elements generally enunciated as follows:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review: (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? . . .

Virginia Petroleum Jobbers Ass'n. v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958). More recently, the D.C. Circuit reviewed these elements and, noting the trend of sister circuits, indicated that if a "balance of the equities" test under the latter three *Virginia Petroleum Jobbers* criteria militated toward a stay, one should likely be granted. *Washington Metropolitan Area Transit Comm'n.* v. *Holiday Tours, Inc.* 559 F.2d 841 (D.C. Cir. 1977). Thus, the court stated (*id.* at 844):

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.

5. Petitioner has here shown that irreparable injury will occur if the status quo is disturbed. It makes the uncontested assertion that "$10,000 to $15,000 additional will be required for proposed findings and reply findings."[1] which expenditure would be superfluous if 92.7 continues to be compelled to specifically perform on the settlement agreement.[2] On the other hand, we see no appreciable injury to 92.7 if Hanover's request is granted. The hearing in this case was designated in 1980 and a deferral of procedural dates at this point in time will cause no significant protraction of the case, relatively speaking. Indeed, nowhere in its voluminous opposition does 92.7 even allege that the relief requested by Hanover will cause it the slightest harm.

6. Insofar as the public interest criterion is considered, this too strongly supports Hanover's request. On top of the fact that deferral of the procedural dates may obviate the public expense in having the Commission consider the competing findings of fact and conclusions of law and, potentially, the issuance of a reviewable Initial Decision, all of which could be mooted by collateral judicial interdiction, the Commission has previously indicated its view that it will defer to state contract law even where the effect

[1] *Hanover Petition*, at 10 n. 11.

[2] In view of our determination that coercing Hanover to make sizable legal expense may well be unnecessary as a result of the operation of contract law, we need not determine whether – as Hanover urges – 92.7's refusal to effectuate the settlement agreement is itself irreparable injury. It is appropriately addressing that issue in the state forum.

of the *lex loci* is to preclude the prosecution of a competing broadcast application by a local entity. *Raul Santiago Roman,* 4 RR 2d 175, *recon. denied,* 38 FCC 2d 619, 4 RR 2d 777 (Rev. Bd. 1965). While Commission policy does favor competing applicants, the Board determined in the aforecited case that federal licensing of stations did not constitutionally oust states of jurisdiction over local contractual matters not in conflict with federal policy. In general, and as a public interest matter as well, the Commission seeks to avoid federal/state conflicts and it expressly recognizes valid local contract law. *Id.*

7. Finally, and in accord with the tenets of *Washington Metropolitan Area Transit Comm'n, supra,* we need not find that Hanover has a "mathematical probability" of success on the merits of any appeals of the state court decision (*see* 559 F.2d at 843). In view of its victory before Circuit Judge Walker, Hanover clearly appears to have "made a substantial case on the merits" *(id.)* and has met the relevant criterion.[3] By contrast, 92.7 does not seriously argue with Judge Walker's decision and expressly notes "that 92.7 did not state that it would not voluntarily comply with Judge Walker's opinion as Hanover has incorrectly stated in its petition." (92.7 Opposition, at pp. 2-3) Rather, 92.7 asserts that Judge Walker has not even, as yet, defined the parameters of the specific performance he has ordered. If that is true, however, it makes all the more compelling Hanover's request that procedural dates be delayed by the ALJ. Both comity and common sense dictate that the legal status of 92.7 be crystalized before proceeding with what may very well become an empty exercise by the Commission.

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[3]Hanover also points out *(Petition* at p. 7 n. 8) that "[o]f 2,257 petitions for review of lower court actions filed with the Virginia Supreme Court last year only 271 were even heard."

8. Hanover, then, has met its various burdens here and we will vacate the ALJ's denial of Hanover's request.[4] The Broadcast Bureau is eminently correct in its support of Hanover, even though we do not inferentially accord with some of its reasoning, *to wit,* that the Commission's policy favoring settlements supports Hanover's petition. Although the law does favor settlement, no Commission precedent prevents withdrawal of settlements or negates entirely the Commission's general policy in favor of a choice between competing applicants. While we will not ignore valid state contract law, *Raul Santiago Roman, supra,* neither will we deter applicants from volitionally withdrawing prior settlement agreements. If 92.7 is enjoined by state law to specifically perform its settlement contract, we expect than the applicant will abide by that law. *Cf. Uniform Policy on Violation of Laws,* 42 FCC 2d 399 (1951).

9. ACCORDINGLY, IT IS ORDERED, That the petition of Hanover Radio, Inc., IS GRANTED; and

[4]We note that at the August 27, 1982 prehearing conference, the ALJ indicated that in ruling on the settlement agreement he intended to consider the parties' proposed findings concerning such matters as 92.7's minority ownership and the outstanding character issues against it. In our judgment, this view of the public interest standard for approving settlements is too broad. Neither the ALJ nor the parties cite any case in which the comparative qualifications of the dismissing applicant were considered relevant in evaluating a proposed settlement agreement, and certainly the irrelevance of examining a dismissing applicant's character qualifications is now well-established. *Allegan County Broadcasters, Inc.,* 83 FCC 2d 371 (1980).

10. IT IS FURTHER ORDERED, That the matter IS REMANDED to the Administrative Law Judge for further action not inconsistent with this order.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal,
Member, Review Board

APPENDIX E

Review Board

§ 0.361 General authority. – (a) The Review Board is constituted pursuant to Section 5(d)(1) of the Communications Act of 1934, as amended, to review decisions of the Administrative Law Judges in all adjudicative proceedings unless at the time of designation, the Commission specifies otherwise. The Board shall also perform those functions set forth in §§ 0.362-0.365 of this Part and any additional duties assigned by the Commission not inconsistent with these functions.

(b) The Board is composed of three or more Commission employees. Members of the Board are designated by the Commission, serve indefinitely on a full-time basis, and are responsible only to the Commission. Neither the Commission nor any of its members will discuss the merits of any matter pending before the Board with the Board or any of its members.

(c) Two members of the Board shall constitute a quorum. The Board may sit in panels of two members. Any member assigned to a case who is not present at oral argument may, after reading the transcript of oral argument, participate in the Board's decision. However, so far as practicable, all of the members of the Board assigned to a case shall hear oral argument. In the case of a tie vote, a member of the Board not recused may review the record and vote; if a third member is not available, the case shall be certified to the Commission for decision.

(d) The member of the Board designated as Chairman by the Commission shall assign panels and cases on the rotational basis to the extent practicable. Each opinion of

the Review Board will be signed by one of its members, who shall be responsible for its preparation.

§ 0.365 Authority delegated. — (a) The Review Board is delegated general authority to take such action as may be necessary to perform those duties specified in §§ 0.361-0.363 of this Part.

(b) The Review Board is delegated specific authority in all adjudicative cases to act on exceptions to initial or summary decisions, appeals from other rulings of Administrative Law Judges pursuant to §§ 1.301 and 1.302 of this chapter, and all related pleadings filed in cases or matters which are before the Board.

Appeal and Reconsideration of Presiding Officer's Ruling

§ 1.301 Appeal from presiding officer's interlocutory ruling; effective date of ruling. — (a) Interlocutory rulings which are appealable as a matter of right. Rulings listed in this paragraph are appealable as a matter of right. An appeal from such a ruling may not be deferred and raised as an exception to the initial decision.

. . . . .

(c) Procedures; effective date.

(1) Unless the presiding officer orders otherwise, rulings made by him shall be effective when the order is released or (if no written order) when the ruling is made. The Commission may stay the effect of any ruling which comes before it for consideration on appeal.

(2) Appeals filed under paragraph (a) of this section shall be filed within 5 days after the order is released or (if no written order) after the ruling is made. Appeals filed under paragraph (b) of this section shall be filed within 5 days after the appeal is allowed.

(3) The appeal shall conform with the specifications set out in § 1.49 and shall be subscribed and verified as provided in § 1.52.

(4) The appeal shall be served on parties to the proceeding (see §§ 1.47 and 1.211), and shall be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

(5) The appeal shall not exceed 5 double-spaced typewritten pages.

(6) Appeals are acted on by the Review Board.

(7) Oppositions and replies shall be served and filed in the same manner as appeals and shall be served on appellant if he is not a party to the proceeding. Oppositions shall be filed within 5 days after the appeal is filed. Replies shall not be permitted, unless the Commission specifically requests them. Oppositions shall not exceed 5 double-spaced typewritten pages. Replies shall not exceed 5 double-spaced typewritten pages.

APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF VIRGINIA

NINETY-TWO POINT SEVEN BROADCASTING, INC., a Virginia Corporation, its officers, directors, and stockholders	)	
and	)	
MARILYN T. EDWARDS, Appellants,	)	Record No. 822184
v.	)	Circuit Court No. G-7536-3
HANOVER RADIO, INC., a Virginia Corporation, Appellee.	)	

MOTION TO DISMISS APPEAL IMPROVIDENTLY GRANTED

Comes now the appellee, Hanover Radio, Inc. ("Hanover" or "appellee"), by its counsel, and moves this Court to dismiss the appeal of Ninety-Two Point Seven Broadcasting, Inc., and Marilyn T. Edwards (collectively "92.7" or "appellants") as improvidently granted due to an incomplete record before the Court. In support of this motion, appellee says as follows:

1. This matter involves an appeal from an order of Judge Willard Walker of the Circuit Court of the City of Richmond granting specific performance on a contract.

On October 11, 1983, the Court agreed to consider the appeal based on its conclusion that appellants had raised a substantial question concerning the subject matter jurisdiction of the Circuit Court. This conclusion, in turn, was premised on the Court's concern "whether the Circuit Court lacked subject matter jurisdiction and is preempted from entering a decree which effectively overrules a final decision of the Federal Communications Commission and directly impinges upon the Commission's exclusive licensing authority."

2. After reviewing the Court's order and appellants' petition for appeal, appellee is convinced that the Court has not been made aware of a September 17, 1982, *Memorandum Opinion and Order,* released by the FCC's Review Board in the licensing proceeding involving the parties in this matter. *Hanover Radio, Inc.*, 91 FCC 2d 849, 52 Pike & Fischer Radio Regulation 2d 403 (1982) (hereinafter *"M, O & O")*[1] (A copy of the Review Board's *M, O & O,* as published in the FCC's official reporter and Pike & Fischer Radio Regulation, is attached hereto for reference as Appendix I.) Under §§ 0.361(a) and 1.301(c)(6) of the Commission's rules, the Review Board is delegated appellate authority over the decisions of the FCC's Administrative Law Judges. (Copies of these rules are attached as Appendix II). The Review Board's orders thus supersede the actions of the Administrative Law Judges.

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[1]The petition for appeal does not mention the Review Board's *M, O & O.* Instead, 92.7 exclusively refers to, and heavily relies upon, an earlier ruling by the Presiding FCC Administrative Law Judge which antedated the lower court's decision herein. Further, informal discussions with the Court's Deputy Clerk raised the question whether the Court was unaware of the Review Board's decision and its significance.

3. It is vital that the Court appreciate the context and importance of the *M, O & O*. Subsequent to the ruling of FCC Administrative Law Judge Joseph Chachkin on May 7, 1982 (referred to at pages 6 - 9 of the petition for appeal), further FCC hearing proceedings on the applications of Hanover and 92.7 were held in June 1982. At the conclusion of these hearings, Judge Chachkin set dates for the submission of proposed findings of fact and conclusions of law by the parties, looking toward an eventual Initial Decision by the ALJ determining which of the applicants would be granted the contested radio construction permit.

4. When Judge Walker's decision granting specific performance was issued in August 1982, Hanover sought a stay of the FCC proceeding[2] pending the outcome of 92.7's appeal from the Circuit Court's order. Hanover argued that, if Judge Walker's decision were upheld by the Supreme Court of Virginia there would likely be no need for further FCC hearing proceedings, since the FCC matter would be settled. Appellants opposed Hanover's request for a stay, advancing arguments similar to those made in the petition for appeal. Judge Chachkin denied the stay on August 27, 1982.

5. Hanover appealed to the FCC's Review Board. Rejecting appellants' argument that the settlement contract at issue was a matter for the Commission, not the Virginia courts, the Review Board unanimously reversed Judge Chachkin and imposed the requested stay.[3] *That is, the Review Board expressly ruled that the question of whether or not to grant specific performance was a question for the*

[2]The dates set for proposed findings had not yet arrived.

[3]The Board's acceptance of an *interlocutory* appeal was an extraordinary action, rarely taken by the FCC or its Review Board. See 91 FCC 2d at 850, 52 RR 2d at 404.

Virginia courts to decide and that the FCC would defer to the Virginia courts on that matter.

6. The *M, O & O's* reasoning is instructive in determining whether the Circuit Court was correct in holding that it did have jurisdiction to order 92.7 to abide by its settlement contract:

> "On top of the fact that deferral of the procedural dates may obviate the public expense in having the Commission consider the competing findings of fact and conclusions of law, and potentially, the issuance of a reviewable Initial Decision, *all of which could be mooted by collateral judicial interdiction,* the Commission has previously indicated its view that it will defer to state contract law even where the effect of the lex loci is to preclude the prosecution of a competing broadcast application by a local entity." *Raul Santiago Roman,* 4 RR 2d 175, *recon. denied,* 38 FCC 2d 619, 4 RR 2d 777 (Rev. Bd. 1965). While Commission policy does favor competing applicants, the Board determined in the aforecited case that federal licensing of stations did not constitutionally oust states of jurisdiction over local contractual matters not in conflict with federal policy. *In general, and as a public interest matter as well, the Commission seeks to avoid federal/state conflicts and it expressly recognizes valid local contract law." Id.* 91 FCC 2d at 851, 52 RR 2d at 405. (Emphasis added.)

7. The Board further held that proposed findings "would be superfluous if 92.7 continues to be compelled to specifically perform on the settlement agreement," that ". . . coercing Hanover to make sizable legal expenses may well be unnecessary as a result of the operation of contract law," and that appellee was "appropriately ad-

dressing [the] issue [of 92.7's refusal to effectuate the settlement agreement] in the state forum." *Id.*, no. 2.

8. The *M, O & O* went on to opine that, in view of Judge Walker's decision, Hanover "clearly appears to have made a substantial case on the merits [of its appeal]." *Id.* In light of this holding, and the reasoning quoted in paragraphs 5 and 6 above, the Review Board found that appellant had met its burden for a stay of Commission proceedings. The *M, O & O* concluded by pointing out that "the Commission will not ignore valid state contract law." Therefore, *"[i]f 92.7 is enjoined by state law to specifically perform its settlement contract, we expect that the applicant will abide by that law . . ."* 91 FCC 2d at 452, 52 RR 2d at 406. (Emphasis added; citation omitted.)[4]

9. The Review Board's *M, O & O* was not appealed by 92.7 to the FCC itself.[5] Accordingly, it is the *"final" agen-*

[4]The Review Board also stated, as 92.7 will no doubt point out, that the FCC would not "deter applicants from volitionally withdrawing prior settlement agreements." 91 FCC 2d at 852, 52 RR 2d at 406. In the context of the *M, O & O*'s discussion, this statement clearly meant only that the Commission would not hold 92.7 to its contract, *but would honor a state court order doing so.* If this statement were interpreted to the effect that the FCC would not permit 92.7 to be forced to dismiss its application, then the quoted language would directly contradict the subsequent sentence wherein the Review Board stated that if 92.7 is ordered to dismiss by this Court, the FCC expects it to do so.

[5]The stay imposed by the *M, O & O* remains in effect pending this Court's decision. Even the formerly erring Judge Chachkin has now reconciled himself to the stay. On November 22, 1982, at a status conference, Judge Chachkin stated: "It seems to me, if we exhaust state court [*sic*], it seems to me it would be appropriate at that point for me to grant the joint petition. I'm going to do so . . . my intention would be to wait until the Supreme Court acts since *according to the Review Board, the matter should be decided at the local level."* (A copy of the relevant page of the transcript of this conference was filed with this Court on January 19, 1983, as an attachment to "Appellee's Motion To Expedite Appellee's Motion To Dismiss.")

cy order upon which this Court should focus in determining whether Judge Walker's order "effectively overrule[d] a final decision" of the FCC or "directly impinge[d] upon the Commission's exclusive licensing authority." Judge Chachkin's ruling permitting 92.7 to resume prosecution of its application, issued *prior* to Judge Walker's order, and Judge Chachkin's later refusal to stay the FCC proceedings, are now nullified by the FCC appellate authority's *M, O & O,* reversing the latter ruling by the ALJ.

10. On its face, the Review Board's *M, O & O* is totally *consistent* with Judge Walker's decision. Plainly, the Review Board contemplated that the Virginia courts had the jurisdiction, and were in the process of exercising that jurisdiction, to specifically compel 92.7 to abide by its settlement contract. Plainly also, the Review Board contemplated that such a ruling could well render "superfluous" further Commission licensing hearings and inevitably lead to a grant of Hanover's application. Far from being concerned by this prospect, the Review Board regarded it as totally proper and consistent with the FCC's mandate to regulate broadcast licensees in the "public interest." There is, in other words, no conflict in the FCC's view, between the FCC's "final decision" and the Circuit Court's order. While the FCC's opinion as to its jurisdictional integrity may not be controlling on this Court, it is respectfully submitted that it should bear great weight. If the *agency itself* is willing to defer to the Virginia courts' holding on the settlement contract at issue, and believes that *the agency* does *not* have jurisdiction to interpret that contract, then there would appear to be no reason for this Court to question its subordinate tribunal's jurisdiction to adjudicate the matter.

11. Hanover is well aware that the relief it seeks is extraordinary. Appellee would have raised the Review Board

decision in a timely brief on the merits but for counsel's understanding that appellee was precluded from doing so by its opting to seek dismissal of 92.7's petition for appeal on procedural grounds.[6] In this connection however, it is noteworthy that 92.7's incredible failure to even mention the Review Board decision in its petition for appeal was conduct akin to the conduct which formed the basis for the procedural motion. Appellants' failure to submit a transcript of the proceedings below has contributed to the Court's apparent confusion about the FCC's position herein. This is because the proceedings below included testimony by an expert witness – a legal practitioner before the FCC – concerning the Commission's settlement approval policies. He testified that the Commission *encourages* settlement agreements because of the fact that they save administrative resources and lead to earlier provision of broadcast service. He also testified that Commission approval of settlement contracts, a routine occurrence in comparative licensing hearings, is generally *pro forma*.

12. The transcript also contains an express instruction by Judge Walker to the effect that, if 92.7 appealed his decision, appellants should make sure that they placed before the Supreme Court a complete record of all of the FCC's proceedings and orders. This, presumably inadvertently, 92.7 has neglected to do. The result is a decision by the Court to consider an appeal, which decision was apparently based on insufficient information about the all-important collateral FCC licensing proceeding.

13. If the Court had had before it a complete transcript, then it would also be aware that Hanover has been found

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[6]Appellee's procedural objection was rejected by order issued May 3, 1983.

by the Commission to be *fully qualified* to be the broadcast licensee of the FM facility at issue. Thus, the Circuit Court's order did not usurp FCC licensing authority because the FCC has maintained the authority to grant or deny Hanover's application. That authority has not been affected by the Circuit Court's order which merely restored the *status quo* prior to 92.7's breach of the settlement contract.

14. In sum, the FCC is currently deferring its own adjudication awaiting the Virginia courts' ruling on a matter of local contract law. The agency is aware that that ruling may impact on its comparative licensing decision; indeed, may even pre-determine it. The agency clearly believes that it does not have jurisdiction to rule on the contractual question litigated before Judge Walker. Should this Court refuse to let stand an opinion on the merits of the contractual dispute on jurisdictional grounds, there will effectively be *no* ruling on the matter. The FCC will be looking to the Court for such a ruling and the Court will be looking to the FCC. Such a "Catch-22" predicament would be both *inconsistent* with fundamental principles of the sanctity of contracts *and* at odds with the FCC's position as stated in the *M, O & O*. Since the *M, O & O* was apparently not before the Court when it granted 92.7's appeal, the Court was not aware of these key considerations. For these reasons, the Court should reconsider and dismiss 92.7's improvidently granted appeal.

WHEREFORE, appellee respectfully requests that this Court dismiss the appeal of Ninety-Two Point Seven Broadcasting, Inc., as improvidently granted.

Respectfully submitted,

HANOVER RADIO, INC.

By: /s/

Arthur H. Horwitz
P.O. Box 11435
Richmond, VA 23230-1435
(804) 288-3259

Its Attorney

October 17, 1983

(Appendices I and II omitted)

APPENDIX G

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 84-44

In the Matter of	)
	)
NINETY-TWO POINT SEVEN	)
BROADCASTING, INC.	)
Mechanicsville, Virginia	)
	)
HANOVER RADIO, INC.	)
Mechanicsville, Virginia	)

MEMORANDUM OPINION AND ORDER
Adopted: February 7, 1984; Released: February 10, 1984

By the Commission: Chairman Fowler not participating.

1. Before the Commission is an Application for Review filed on November 28, 1983, by Ninety-Two Point Seven Broadcasting, Inc. (92.7) pursuant to Section 1.102(b)(3) of the Commission's Rules. See 47 C.F.R. § 1.102(b)(3).[1] Ninety-Two Point Seven's Application for Review seeks review of a letter dated November 10, 1983, issued by Daniel M. Armstrong, Associate General Counsel,[2] which

[1]Ninety-Two Point Seven's reference to Section 1.102(b)(3) is incorrect. That rule concerns the effective dates of actions taken pursuant to delegated authority and stays thereof. The relevant provision is Section 1.115 of the Commission's Rules. 47 C.F.R. § 1.115.

[2]Subsequently, 92.7 wrote another letter to the General Counsel, Bruce Fein, expressing its displeasure with Mr. Armstrong's letter and questioning the circumstances surrounding its release. The General Counsel responded to 92.7's second letter on December 2, 1983. At that time, the General Counsel affirmed Mr. Armstrong's conclusions and found that 92.7's concerns regarding the circumstances surrounding the release of the letter were unfounded.

addressed the issue of whether the Virginia court system has the authority to determine the validity of contracts between entities subject to our licensing authority under Title III of the Communications Act. The General Counsel's Office concluded that such authority exists. Hanover Radio, Inc. (Hanover) has filed an opposition to the Application for Review. For the reasons set forth below, we conclude that the General Counsel's interpretation of the law and our policy was correct and should be affirmed.

Background

2. Hanover and 92.7 are currently mutually exclusive applicants before this Commission.[3] They are both seeking to obtain an FM broadcasting license to serve Mechanicsville, Virginia. On February 2, 1982, Hanover and 92.7 entered into a settlement agreement. Pursuant to that agreement, Hanover was to reimburse 92.7 for its expenses in preparing and prosecuting its application; in return, 92.7 was to request dismissal of its application. After the executed settlement agreement was submitted to the presiding Administrative Law Judge, Joseph Chachkin, but before he approved it,[4] 92.7 sought to withdraw from the settlement agreement contract and continue prosecuting its application. Judge Chachkin granted 92.7 motion to withdraw because he, and apparently the Broadcast Bureau, believed he was without the authority to enforce the settlement agreement.[5] The Judge also refused to stay the proceeding while Hanover sought enforcement of

[3]BC Dockets Nos. 80-664 and 80-665.

[4]The Broadcast Bureau had supported approval of the agreement.

[5]*See* Ninety-Two Point Seven's Petition for Appeal in the Supreme Court of Appeals of Virginia at Richmond, page 9.

its contract in court. Hanover proceeded to seek enforcement of the settlement agreement in the Virginia Circuit Court of the City of Richmond. On September 14, 1982, the Circuit Court concluded that the agreement between 92.7 and Hanover constituted an enforceable contract and awarded Hanover specific performance. On September 17, 1982,[6] the Review Board vacated the Judge's refusal to stay the proceedings.[7] On October 11, 1983, the Virginia Supreme Court consented to hear 92.7's appeal on the sole issue of "whether the Circuit Court lacked subject matter jurisdiction and is preempted from entering a decree which effectively overrules a final decision of the Federal Communications Commission, and directly impinges upon the Commission's exclusive licensing authority." Hanover has filed a "Motion to Dismiss Appeal Improvidently Granted."

3. By letter dated October 26, 1982, 92.7 informed the General Counsel's Office of the Virginia Supreme Court proceeding and indicated we might wish to intervene in that proceeding in order to preserve our jurisdiction over the subject matter. By letter dated November 3, 1983, Hanover also brought this proceeding to the General Counsel's attention and requested that he either submit comments on Hanover's Motion or, in the event the motion is denied, seek the Supreme Court's consent to file a

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[6] *Hanover Radio, Inc.*, 91 FCC 2d 849 (1982).

[7] The Review Board, while considering and balancing the factors set forth in *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), noted that ". . . the Commission has previously indicated its view that it will defer to state contract law even where the effect of the *lex loci* is to preclude the prosecution of a competing broadcast application by a local entity. *Paul Santiago Roman*, 4 RR 2d 175, *recon. denied*, 38 FCC 2d 619, 4 RR 2d 777 (Rev. Bd. 1965)." 91 FCC 2d at 851.

brief *amicus curiae* in the proceeding. On November 10, 1983, the General Counsel's Office responded with the subject letter from Daniel M. Armstrong.[8] Although the General Counsel's Office declined to become directly involved in the proceeding, it did briefly address the legal question presented to the court. It concluded that the Circuit Court had the subject matter jurisdiction to review the contract dispute and to fashion the appropriate remedy. By letter dated December 2, 1983, the General Counsel affirmed Mr. Armstrong's interpretation of the law.[9]

Issues

4. In the Application for Review, 92.7 requests that the Commission reverse the interpretation of law and the statement of Commission policy as contained in the letter dated November 10, 1983 from the Office of the General Counsel to Hanover's attorney and direct the General Counsel to file a brief *amicus curiae* in the pending court proceeding. Ninety-Two Point Seven advances three arguments in support of its request. First, 92.7 contends that Eugene F. Mullin, Counsel for Hanover, and the staff of the General Counsel's Office engaged in *ex parte* contacts. Ninety-Two Point Seven bases its contention upon the fact that the letter dated November 10, 1983 was

[8]The letter was actually signed by John E. Ingle, Deputy Associate General Counsel, on behalf of Mr. Armstrong, Associate General Counsel.

[9]The General Counsel also concluded that, contrary to 92.7's contentions in its letter dated November 10, 1983, his staff had not violated the *ex parte* rules and had the authority to provide Hanover with an interpretation of the law and the Commission's policy.

solicited solely by Hanover[10], that the staff responded within seven days to Hanover's request for intervention, and that the subject letter was hand-delivered to the Virginia Supreme Court the day after its release, even though the Court was closed that day in observance of Veteran's Day. Second, 92.7 asserts that Hanover has improperly represented to the Virginia Supreme Court that the subject letter represented the opinion of the General Counsel. Ninety-Two Point Seven notes that the letter was not signed by the General Counsel.[11] Third, 92.7 maintains that the General Counsel's consideration of the jurisdiction question was inadequate. Ninety-Two Point Seven asserts that the General Counsel's letter treated the issue in a cavalier manner and lacked in-depth analysis. Contrary to the General Counsel's position, 92.7 contends that the question is not who has the authority to determine the validity of contracts between entities subject to the Commission's licensing authority,[12] but rather the issue is whether the courts can encroach upon the Commission's Title III licensing authority by forcing two competing applicants to settle even though the Commission has never approved their settlement. Ninety-Two Point Seven considers the Commission's approval of the settlement contract tantamount to consummation of the contract. Further, 92.7 asserts that permitting the courts to enforce unconsummated settlement agreements is contrary to the

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[10]We note that 92.7 was served with a copy of Hanover's request for the Commission's intervention.

[11]Ninety-Two Point Seven also speculates that the Virginia Supreme Court may interpret the letter as an official statement by the Commission on the Virginia litigation or as an advisory opinion.

[12]Ninety-Two Point Seven asserts that neither the courts nor the Commission can enforce such contracts unless they have already been approved by the Commission.

public interest because one settling party will be involuntarily before the Commission.

5. In response, Hanover asserts that 92.7's *ex parte* argument is based upon speculation and conjecture. Hanover notes that because 92.7 was served with a copy of Hanover's letter dated November 3, 1983, the letter was properly filed in accordance with the Commission's *ex parte* rules.[13] Furthermore, the status inquiries directed to the staff were permissible under the Commission's *ex parte* rules. See 47 C.F.R. § 1.1227(e). Second, Hanover asserts that it was not a misrepresentation to identify the subject letter as originating from the Office of General Counsel. Although the General Counsel did not sign the letter, Hanover notes that it was executed on behalf of the Associate General Counsel. Finally, with regard to the merits of the legal question presented, Hanover maintains that, procedurally, 92.7's application for review is a belated effort to reverse the Review Board's 1982 order which concluded that the problem of contract enforcement should be resolved in the courts. Moreover, Hanover notes that 92.7 has not cited any authority to support its interpretation of the law. With respect to the public interest, Hanover contends that it would be ill served for the Commission to ignore valid contracts and encourage the courts to do likewise.

Discussion

6. We find that 92.7's arguments concerning potential violations of the Commission's *ex parte* rules are unfounded and based upon mere speculation. Initially, we agree

[13] On the other hand, 92.7's letter dated October 26, 1983, apparently was not served on Hanover.

with the conclusion of the Office of the General Counsel in its December 1983 letter that it is doubtful that the *ex parte* rules even apply in this situation. Nevertheless, assuming the *ex parte* rules do apply, there have been no violations. First, as long as Hanover served 92.7 with a copy of its letter requesting our intervention in the Virginia Supreme Court proceeding, then under the definition of an "*ex parte* presentation", 47 C.F.R. § 1.1201(g), there has been no prohibited *ex parte* presentation. *See* Commission Rules § 1.1227(e), 47 C.F.R. § 1.1227(e). Ninety-Two Point Seven's remaining assertions of *ex parte* contacts are equally speculative and without merit.[14] Accordingly, we reject 92.7's *ex parte* allegations.

7. Furthermore, with respect to 92.7's misrepresentation allegations, there was no misrepresentation in Hanover informing the Virginia Supreme Court that the subject letter represented the opinion of the Office of the General Counsel. In that letter, the General Counsel affirmed Mr. Armstrong's interpretation of the law and relevant Commission policy. Furthermore, in such instances where there is no novel issue of law or policy, the Office of General Counsel may issue advisory opinions for the Commission.

8. Finally, 92.7 has failed to present us with any legal or policy arguments which would warrant our reversing the General Counsel's conclusions in the November 10, 1983, letter. Ninety-Two Point Seven argues that the courts cannot enforce settlement agreement contracts prior to Commission approval because the contracts are not consummated until that time and, further, such actions encroach upon the Commission's authority to determine whether

[14]For example, 92.7 argues that the staff's promptness is an indicia of an *ex parte* contact. That assertion is on its face without merit.

the settlement is in the public interest. We disagree. The question of whether a valid and binding contract exists is one of state contract law. While Section 311(c) of the Act, 47 U.S.C. § 311(c), requires that the contract not be effectuated until the applicants have received Commission approval, the Act does not preclude applicants from entering into valid contracts that are subject to our approval. The enforcement of such contracts at any point after they become legally binding under state law does not impede our ability to reach a public interest determination vis-a-vis the settlement agreement. Even though the court could require the litigants to submit the agreement to the Commission,* the court cannot require our approval of the agreement. Further, pursuant to Section 309(a) of the Communications Act, 47 U.S.C. § 309(a), the Commission must also determine whether a grant of the remaining application is in the public interest.

9. In sum, the Virginia state courts have the power to decide whether Hanover is entitled to specific performance of its contract with 92.7. If the state courts answer this question in the negative, the Commission proceedings can go forward and the applicants will be considered comparatively. If specific performance is ordered, the Commission retains its power to determine whether to grant 92.7's motion to dismiss its application and approve the terms of the settlement agreement. Furthermore, even after dismissal of 92.7's application, the Commission has the authority to decide whether a grant of Hanover's application would be in the public interest. We believe that the above demarcation of respective roles of the Virginia courts and this Commission in a situation involving both the validity of a private contract under state law and the Commission's licensing responsibility reflects a proper accommodation between state and federal authority and is

consistent with the Supreme Court's decision in *Radio Station WOW v. Johnson,* 326 U.S. 120 (1945).

10. Additionally, to the extent the settling applicant may wish to present evidence on the question of whether the remaining application should be granted, we note that it has already had an opportunity to raise and support relevant allegations in a petition to enlarge issues. Assuming those issues were designated against the remaining applicant, they can be resolved in hearing where the Mass Media Bureau can present relevant evidence which bears on the public interest. Thus, the settling applicant's, here 92.7's, presence is not essential.

11. For these reasons and those set forth in the General Counsel's November 10, 1983, letter, we concur with the General Counsel's position that the courts have the jurisdiction to interpret and enforce settlement agreement contracts.

12. Accordingly, IT IS ORDERED that the application for Review filed by Ninety-Two Point Seven Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

November 10, 1983

IN REPLY REFER TO:

Eugene F. Mullin, Esquire
Mullin, Rhyne, Emmons and Topel
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036

Re: Ninety-Two Point Seven Broadcasting, Inc., et al. v. Hanover Radio, Inc.

Dear Mr. Mullin:

I am writing in response to your letter dated November 3, 1983, concerning the above-referenced proceeding pending in the Supreme Court of the State of Virginia. According to your letter, Ninety-Two Point Seven Broadcasting, Inc. (92.7) and Hanover, Radio, Inc. (Hanover), two mutually exclusive applicants currently before this Commission, are involved in a contract dispute in the Virginia state courts. The subject contract concerns an executed settlement agreement between your client, Hanover, and 92.7. Apparently, 92.7 withdrew from the settlement agreement after it was submitted to Administrative Law Judge Chachkin. Consequently, Hanover sought specific performance of the contract in the Virginia courts and has succeeded in its claim before the Circuit Court in Richmond. The Virginia Supreme Court, however, has consented to hear 92.7's appeal on the sole issue of "whether

the circuit court lacked subject matter jurisdiction and is preempted from entering a decree which effectively overrules a final decision of the Federal Communications Commission, and directly impinges upon the Commission's exclusive licensing authority." Hanover has filed a "Motion to Dismiss Appeal Improvidently Granted." You have requested that we either submit comments on Hanover's Motion or, in the event the motion is denied, seek the Supreme Court's consent to file a brief *amicus curiae* in this proceeding.

We must respectfully decline your request. It is the Commission's general policy to refrain from becoming directly involved in civil suits that concern the Commission's licensees or applicants, unless formally requested to express its position by a court. I am sure you can appreciate this position when considered in light of this agency's heavy workload and relatively small staff. We will, however, briefly address the legal question presented to the Court.

The principal question before the Virginia Supreme Court concerns who has the authority to determine the validity of contracts between entities subject to our licensing authority under Title III of the Communications Act, and to fashion the appropriate remedy when they are breached. We concur with your position that the state courts have this authority. In 1950, the United States Supreme Court concluded that the Communications Act does not give the Commission the authority to determine the validity of contracts between licensees and others. *Regents of the University System of Georgia v. Carroll,* 338 U.S. 586, 600-602 (1950). Subsequently, this Commission has indicated on several occasions that contract disputes between licensees or applicants and others should be resolved in the state courts. *See Flower City Broad-*

casting, Corp., 20 FCC 2d 985, 987 (1970); *Raul Santiago Roman*, 38 FCC 290, 294 (Rev. Bd. 1965); *Business Radio Service Licensee WZN 576*, FCC 83-135, Mimeo 33037, released April 14, 1983 [53 RR 2d 1021, 1023 (1983)]. Indeed, even before the *Carroll* decision, this Commission had found that such disputes were within the exclusive jurisdiction of the courts. *Assignment of License of Station WMCA*, 10 FCC 241, 242 (1943). Similarly, the state courts must ultimately fashion the appropriate remedy under state law, including, if warranted, specific performance.[1] *See e.g., Business Radio Service Licensee WZN 576, supra; Assignment of License of Station WMCA, supra.*

Any decision ultimately rendered by a state court with respect to such contracts will not, of course, be dispositive in any subsequent licensing proceedings before this Commission. *See Central Coast Broadcasters, Inc.*, 18 FCC 2d 886, 887 (1969); *Assignment of License of Station WMCA, supra.* After the court has determined the rights and duties of each party to the litigation, it may still be necessary for one or more of the parties to file an application with this Commission in order to effectuate the contract. Pursuant to Section 309(a) of the Communications Act, 47 U.S.C. § 309(a), the Commission must then determine whether a grant of that application is in the public interest.

In our view, the Circuit Court had subject matter jurisdiction to review the contract dispute between the applicants and the authority to fashion an appropriate remedy, in-

[1]Specific performance would not be available in those instances where its effect would be to invalidate or overturn a Commission rule or order. For the reasons given herein, that is not the situation before the court.

cluding ordering specific performance. A court order directing 92.7 to abide by the settlement agreement in the contract would not impinge upon our exclusive licensing authority. Under the settlement agreement, 92.7 would only need to seek our approval of the settlement. In directing 92.7 to seek our approval, the court would not be usurping our authority to determine whether approval of that settlement agreement is in the public interest.

Finally, a court order to resubmit the settlement agreement to the Administrative Law Judge would not in effect overrule his earlier approval of 92.7's withdrawal from the agreement. The judge had not reached a final determination on whether approval of the settlement agreement was in the public interest. In that instance, a second request for his approval would be futile. Instead, the Judge has only acceded to 92.7's request to withdraw from the settlement agreement. Nothing precludes 92.7 from again submitting the settlement agreement. Indeed, if 92.7 is to be bound by its settlement agreement contract, your only avenue for seeking enforcement was to request such specific performance in the court. Contrary to 92.7's arguments, an appeal of 92.7's withdrawal through the Commission's processes would have been futile because, as noted above, we have no general authority to enforce contracts of this kind. In short, although the Administrative Law Judge has permitted the parties to return to a comparative posture, the court would not be overruling that determination by ordering 92.7 to honor its contract and again request, along with Hanover, the Judge's approval of the settlement agreement.

I trust the foregoing will be responsive to your concerns.

Sincerely yours,

/s/
Daniel M. Armstrong
Associate General Counsel

cc: Manuel R. Geraldo, Esq.

APPENDIX H

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554 FCC 84-R-31

In re Applications of	)	
	)	
HANOVER RADIO, INC.	)	
Mechanicsville, Virginia	)	**BC Docket No. 80-664**
	)	**File No. BPH-780831AQ**
NINETY-TWO POINT SEVEN	)	
BROADCASTING, INC.,	)	**BC Docket No. 80-665**
Mechanicsville, Virginia	)	**File No. BPH-780831AR**
	)	
For Construction Permit	)	
for a New FM Station	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1984; Released: May 7, 1984

By the Review Board:

1. The Review Board has before it an appeal filed April 16, 1984, by Ninety-Two Point Seven Broadcasting, Inc. (92.7) which seeks (1) reversal of the Administrative Law Judge's *Memorandum Opinion and Order (M.O. & O.)*, FCC 84M-1320, released March 16, 1984 (ALJ), in which he approved a settlement agreement, dismissed 92.7's application, granted the application of Hanover Radio, Inc. (Hanover), and terminated the proceeding; and (2) a stay of this proceeding pending a ruling by the Supreme Court of the United States on an appeal to be brought by 92.7

from enforcement of the settlement agreement.[1] For the reasons set forth below, we will deny 92.7's appeal, but, *sua sponte,* set aside the ALJ's grant of Hanover's application and impose a stay.

2. This appeal is a continuation of litigation stemming from 92.7's March 1982 attempted withdrawal from a settlement agreement between it and Hanover, under which appellant was to receive reimbursement from Hanover in return for dismissal of its application. On August 17, 1982, pursuant to a lawsuit brought by Hanover, the Virginia Circuit Court of the City of Richmond ruled that Hanover was entitled to specific performance of the agreement and it directed 92.7 to continue prosecution of the settlement agreement before the Commission.[2] 92.7's appeal of the Circuit Court's order to the Virginia Supreme Court was ultimately dismissed on February 6, 1984. On March 8, 1984, 92.7 filed a motion with the Virginia Supreme Court for a stay of the Circuit Court's order pending appeal to the United States Supreme Court. On March 16, 1984, the ALJ released his *M.O. & O.* approving the joint request for the proposed settlement agreement, concluding that the applicants had complied

[1]The Board also has before it an opposition filed April 18, 1984 by Hanover, and a supplement filed April 30, 1984, by 92.7, which, in effect, is a reply to Hanover's opposition. The supplement is an unauthorized pleading since Section 1.301(c)(7) does not permit replies unless specifically requested by the Commission; it is therefore dismissed.

[2]Based upon deference to the state court's order of specific performance, we stayed the FCC proceeding. *Hanover Radio, Inc.*, 91 FCC 2d 849 (Rev. Bd. 1982). The substance of the Board's action was approved by the full Commission. *Ninety-Two Point Seven Broadcasting, Inc.*, 55 RR 2d 607 (1984). It noted the Board's stay, *id.*, at n. 7, and affirmed that "the Virginia state courts have the power to decide whether Hanover is entitled to specific performance of its contract with 92.7." *Id.*, at 611.

with applicable Commission requirements. It is from that *M.O. & O.* that 92.7 appeals.

3. In support of its appeal and request for a stay, 92.7 claims that, subsequent to the ALJ's *M.O. & O.*, the Supreme Court of Virginia issued a further order (on March 22, 1984) staying execution of the Circuit Court's order until May 7, 1984, unless that case is docketed in the Supreme Court of the United States prior thereto, in which event enforcement would be stayed until final determination of the case by the Supreme Court. 92.7 here asserts that it intends to file a full appeal from the Virginia Circuit Court in the United States Supreme Court and that a stay denial would deprive it of an opportunity to own a broadcast license should it prevail. It therefore urges the Board to reverse the ALJ's opinion, allow it to withdraw from the settlement agreement, and to stay further proceedings pending a ruling by the United States Supreme Court regarding the Virginia Circuit Court's jurisdiction over the settlement agreement.

4. For the following reasons, we will deny the stay requested by 92.7 on the grounds offered,[3] but, *temporalis,* we will set aside the ALJ's grant of the construction permit to Hanover and his termination of this proceeding. Because of our action hereinbelow, we need only touch briefly on our substantive denial of 92.7's own stay request. As observed in our prior ruling in this proceeding, *Hanover Radio, supra* note 2, the general criteria for the issuance of a stay are articulated in *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1959).[4] Based on

[3]Our denial is, however, effectively moot since we stay the proceeding on our own motion for the reasons explained at para. 5, *infra.*

[4]91 FCC 2d at 851.

the Commission's clear ruling in *Ninety-Two Point Seven Broadcasting, supra* note 2, that the disposition of the underlying settlement agreement is a matter for *lex loci* resolution, this Board – as a subordinate body – cannot now find that 92.7 has presented a "serious legal question"[5] with respect thereto, despite its appeal to the United States Supreme Court. Insofar as our present purview of the merits of 92.7's contentions respecting the settlement contract, that matter is decided beyond legal question in this forum.

5. As to 92.7's appeal of the ALJ's approval of the settlement agreement and termination of the proceeding with the grant to Hanover, we note that just 6 days after the ALJ released the *M.O. & O.* here appealed, the Supreme Court of Virginia stayed execution of the lower court's order directing specific performance of the settlement contract.[6] As noted *supra,* both the Board and the Commission have firmly ruled that the status and disposition of the contract matter is for *jus privatum* determination. In the wake of the Virginia Supreme Court's March 22 stay of the Circuit Court's order, it would appear that 92.7 is not currently under a mandate to specifically perform on the settlement agreement and, thus, the contractual matter remains locally *sub judice* for the present. The Commission and the Board having declared deference to *lex loci* jurisdiction over the contract dispute, the ball is now again in the court(s) of Virginia and we shall await its return. In *Hanover Radio,* we stayed these proceedings pending

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[5] *See Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). *Compare Hanover Radio, supra,* where the party requesting a suspension of the proceeding accompanied its request with the state Circuit Court order directing 92.7 to specific performance of the settlement agreement.

[6] 92.7 Br. at Exh. III.

definitive resolution of the contractual matter in the state courts. The matter apparently being unresolved with finality, we will set aside the *M.O. & O.* and, *sua sponte,* reimpose the prior stay granted in *Hanover Radio* for the reasons set forth therein.[7] Should there be a dissolution of the Virginia Supreme Court stay, the ALJ should, in turn, reinstate the *M.O. & O.*[8]

6. ACCORDINGLY, IT IS ORDERED, That the appeal of Ninety-Two Point Seven Broadcasting, Inc. From Order Terminating Proceedings, filed April 16, 1984, IS DENIED; and

7. IT IS FURTHER ORDERED, That *Memorandum Opinion and Order,* FCC 84M-1320, released March 16, 1984, IS SET ASIDE, and that this proceeding IS STAYED pending final disposition of the Virginia Circuit Court ruling of August 17, 1982 referred to herein.

FEDERAL COMMUNICATIONS COMMISSION

/s/
Norman B. Blumenthal
Member, Review Board

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[7]Indeed, it was Hanover that originally requested a stay pending state court resolution. We granted the stay on that basis. But, that door swings both ways.

[8]Our action, of course, does not reflect on the ALJ since his action preceded the stay issued by the Virginia Supreme Court. Had that court not issued its stay, 92.7's appeal to the United States Supreme Court would have furnished no independent basis for our instant action. *Cf.* 28 U.S.C.2349(b) (court appeal "does not of itself stay or suspend the operation of the order of the agency").

APPENDIX I

CIRCUIT COURT
OF THE
CITY OF RICHMOND

Willard I. Walker
Judge

John Marshall Courts Building
800 East Marshall Street
Richmond, Virginia 23219

September 30, 1982

Mr. Manuel R. Geraldo
Robinson & Geraldo, P.C.
225 Fourth Street, N.E.
Washington, D.C. 20002

Dear Mr. Geraldo:

Re: Case No. G-7536-3
Hanover Radio, Inc. v. Ninety-Two
Point Seven Broadcasting, Inc., et al.

So long as Ninety-Two Point Seven fully complies with its contract with Hanover Radio and with the court's order, then it can do no more. If the Federal Communications Commission, despite the fact that both parties have filed a joint request and are legitimately seeking to have the application of 92.7 withdrawn, and 92.7 paid its legitimate costs nonetheless rejects this agreement on the part of the parties, which it has the right to do, then Ninety-Two Point Seven is not required to pursue any further courses of action. This court is undertaking to rule upon those things which are within its jurisdiction, that is, the contract between the parties. It certainly has no intention of interfering with the powers and rights of the Federal Communications Commission.

It is probably unnecessary to add this comment, but I am bound to say that if on a subsequent hearing it were to turn out that Ninety-Two Point Seven had taken action contrary to the court's order and contrary to the contract and that action brought about the FCC's refusal to honor the agreement, this court would take severe and appropriate action.

Very truly yours,

/s/
Willard I. Walker

sac
cc: Mr. Sa'ad El-Amin
Mr. Arthur H. Horwitz

APPENDIX J

ROBINSON & GERALDO, P.C.
ATTORNEYS AT LAW
225 FOURTH STREET, NORTHEAST, CAPITOL HILL
WASHINGTON, D.C. 20002
202-544-2889

GERALD S. ROBINSON
MANUEL R. GERALDO
DAVID M. ROSENBERG
MANAGING ASSOCIATE

October 28, 1982

Honorable Joseph Chachkin
Federal Communications Commission
2000 L Street, N.W. 2nd Floor
Washington, D.C. 20554

Re: Ninety-Two Point Seven
Broadcasting, Inc.
Mechanicsville, Virginia
BC Docket No. 80-665
File No. BPH-780831 AR

Dear Judge Chachkin,

Enclosed for your review is a copy of Ninety-Two Point Seven's and Marilyn Edwards' Motion to Suspend Judgment which was filed with the Supreme Court of Virginia on October 14, 1982, in connection with *Hanover* vs. *Ninety-Two Point Seven,* G-7536-3.

In addition, I have also enclosed a letter from Judge Walker further clarifying his Order and expressly recognizing the FCC's right to reject the agreement.

Sincerely yours,

/s/
Manuel R. Geraldo
Attorney At Law

MRG/pgr
cc: Howard Weiss, Esquire
William Silva, Esquire

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END OF DOCKET